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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH LOPEZ,

Defendant and Appellant.

B287916

(Los Angeles County
Super. Ct. No. GA053520)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Kenneth Lopez (Lopez) appeals from the trial court's order denying his petition for resentencing under the Three Strikes Reform Act of 2012 (hereafter, Proposition 36). Lopez argued that he was eligible for resentencing because he did not intend to inflict great bodily injury during the commission of his current offense. The trial court rejected Lopez's contention. For the reasons stated below, we affirm.

BACKGROUND

Lopez and the victim were in a relationship and lived in the same homeless shelters for several months. One afternoon, Lopez and the victim got into an argument, during which the victim called Lopez a "fag" and "homo." Lopez then punched the victim three times in the face and head area, grabbed her by the hair, and banged her head against the ground. At the same time, the witness was driving by and saw Lopez banging or trying to bang the victim's head on the ground. He got out of his car and pulled Lopez off of the victim. Lopez told the witness that he did not want any trouble. Although he saw no blood on the victim, the witness saw red marks on her wrist, arm, and neck. The arresting officer saw a one-inch bruise on one of her arms, but saw no visible injuries on Lopez. After he was arrested, Lopez told the police, "I meant to do her bad."

Lopez was tried and found guilty of corporal injury to a cohabitant (Pen. Code,¹ § 273.5, subd. (a); count 1) and assault by means likely to produce great bodily injury (§ 245, subd. (a)(1); count 2). The trial court found that Lopez had been convicted of two prior serious or violent felonies within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12 subds. (a)-(d))

¹ All further statutory references are to the Penal Code.

and had served four prior prison terms for three counts of burglary (§ 459) and one count of cruelty to animals (§ 597). The trial court sentenced Lopez to 25 years to life on count 1 plus four years based on the prior prison terms. The trial court also sentenced Lopez to 25 years to life, plus four additional years on count 2, and stayed the sentence under section 654.

Following the passage of Proposition 36, Lopez petitioned to recall his sentence under section 1170.126. The People opposed the petition, arguing that Lopez was disqualified under section 1170.126, subdivision (e)(3) for relief under Proposition 36 because Lopez intended to cause great bodily injury during the assault.

The trial court denied Lopez's petition, finding that Lopez was disqualified because he intended to inflict great bodily injury on the victim.

DISCUSSION

Lopez contends that the trial court applied the wrong standard when it determined that he intended to inflict great bodily injury on the victim. Lopez argues that, to find intent to inflict great bodily injury, the trial court must also find that Lopez actually inflicted great bodily injury. From there, Lopez argues that there was insufficient evidence to support the trial court's finding because the victim's injuries were minor. We disagree with Lopez's premise and his conclusion.

I. Standard of review and Proposition 36

Proposition 36 "authorizes prisoners serving third strike sentences whose 'current' offense (i.e., the offense for which the third strike sentence was imposed) is not a serious or violent felony to petition for recall of the sentence and for resentencing

as a second strike case.” (*People v. Johnson* (2015) 61 Cal.4th 674, 679–680.) “In addition to reducing the sentence to be imposed for some third strike felonies that are neither violent nor serious, [Proposition 36] provides a procedure by which some prisoners already serving third strike sentences may seek resentencing in accordance with the new sentencing rules. (§ 1170.126.) ‘An inmate is eligible for resentencing if . . . [¶] . . . [t]he inmate is serving an indeterminate term of life imprisonment imposed pursuant to [the Three Strikes law] for a conviction of a felony or felonies that are not defined as serious and/or violent.’” (*Johnson*, at p. 682.) A defendant is disqualified from resentencing if, “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

The trial court is not limited to consideration of the elements of the current offense but may look to the entire record of conviction in determining whether a defendant qualifies for resentencing under Proposition 36. (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1110.) The defendant has the initial burden of establishing eligibility, and if that burden is met, then the prosecution can establish ineligibility on other grounds. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 963.) Although the disqualifying factor need not be an element of the current offense and Proposition 36 does not lay out a pleading and proof requirement, the standard of proof is beyond a reasonable doubt. (*People v. Arevalo* (2016) 244 Cal.App.4th 836, 852–853.)

We review the factual basis of the trial court’s ineligibility determination for sufficiency of the evidence. (*People v. Guilford*

(2014) 228 Cal.App.4th 651, 661.) “ ‘We review the whole record in a light most favorable to the [order] to determine whether it contains substantial evidence, i.e., evidence that is credible and of solid value, from which a rational trier of fact could find beyond a reasonable doubt that the accused committed the offense.’ ”
(*Ibid.*)

II. Sufficient evidence supports the trial court’s determination that Lopez intended to inflict great bodily injury

As an initial matter, we disagree with Lopez’s premise that the trial court was required to find that he actually inflicted great bodily injury before it could find his intent to do the same. While Proposition 36 expressly disqualifies a defendant who intends to inflict great bodily injury, there is no further requirement that the defendant is successful in doing so. (§ 667, subd. (e)(2)(C)(iii); see § 1170.126, subd. (e)(2).) Further, an individual’s “intent ‘is a question of fact to be determined from all the circumstances of the case.’ ” (*Hudson v. Superior Court* (2017) 7 Cal.App.5th 1165, 1171.) The intent to inflict great bodily injury “may be shown by, and inferred from, the circumstances surrounding the doing of the act itself.” (*People v. Phillips* (1989) 208 Cal.App.3d 1120, 1124.) Section 12022.7, subdivision (f) defines great bodily injury as a “significant or substantial physical injury.” Although minor or moderate harm is insufficient to constitute great bodily injury, “the injury need not be so grave as to cause the victim ‘ ‘permanent,’ ‘prolonged,’ or ‘protracted’ ’ bodily damage.” (*People v. Cross* (2008) 45 Cal.4th 58, 64.)

Here, Lopez admitted to police that he grabbed the victim by the hair, pulled her down, and tried to bang her head against the ground. Even if he was unsuccessful in banging her head, the conduct Lopez engaged in supports the inference that he did

intend to inflict great bodily injury. Moreover, Lopez made his intent plain when he told police, “I meant to do [the victim] bad.” Sufficient evidence supports the trial court’s finding that Lopez intended to inflict great bodily injury. (See *People v. Phillips*, *supra*, 208 Cal.App.3d at p. 1124.)

DISPOSITION

The order is affirmed.

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DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

MURILLO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.